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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 636

EMPIRE RAYON YARN CO., INC.,

Petitioner,

against

AMERICAN VISCOSE CORPORATION, FRED MALINA, ARTHUR MALINA, EDYTHE M. CHARNAS and FRED H. DIAMOND, co-partners doing business as MALINA COMPANY, and GUTNER BROTHERS CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent American Viscose Corporation ("American" herein), together with the other respondents above named ("Malina" and "Gutner" herein), pray that the petition for a writ of certiorari filed October 6, 1966* by Empire Rayon Yarn Co., Inc. ("Empire" herein) to review the decision of the United States Court of Appeals for the Second Circuit of July 18, 1966 be denied.

Opinions Below

We add to those opinions cited by petitioner that of the District Court for the Southern District of New York

* Upon application under Rule 34(5), the time to file this brief in opposition was duly extended to December 5, 1966.

(Weinfeld, D.J.) reported at 160 F. Supp. 334 and appearing at pp. 12a-17a of Plaintiff-Appellant's Appendix filed below and submitted to this Court by Petitioner. The opinion on rehearing *in banc* by the Court of Appeals for the Second Circuit has now been reported at 364 F. 2d 491.

Questions Presented

We think the principal questions could be more simply stated than those formulated by petitioner. Thus—

1. Under the stipulated facts in this case, was American's payment or allowance of a 5% discount to Malina and Gutner, computed upon proof of yarn resales at American's list price, violative of Section 2(c) of the Robinson-Patman amendments to the Clayton Act?

2. Was there anything in this arrangement to invoke Sections 2(d) and 2(e) of the Act?

3. Can it be said that the Court of Appeals below improperly delegated its judicial authority to the Federal Trade Commission and, if so, with what consequence to the parties?

Statement

At all times relevant, respondent American was a producer of rayon yarn sold under the name Avisco either directly to textile manufacturers or to selected distributors or jobbers for resale to small converters (D.A. 20a-21a). The yarn is sold* to processors or converters at a list price and to those performing a jobbing function at list price less a five percent discount payable upon proof

* We employ the present tense to maintain continuity in the context of the case. Actually, since the record herein closed some years ago, American has sold all its operating assets and, today, is no longer in the rayon business and has no relationship with any other party hereto.

of resale at list (D.A. 20a-21a; P.A. 42a). Neither American nor, so far as is known, any other producer in this industry has ever employed brokers in distributing yarn.

American's jobber customers (Malina, Gutner and Shawmut) take title to the yarn and assume all marketing risks in connection with yarn resales. They solicit and obtain their own customers, assume risks of loss and credit, operate warehouses, maintain inventories, advertise, employ salesmen and furnish technical assistance to their customers (P.A. 40a-41a). They are, in every sense, independent business men who operate as jobbers at a level of distribution between American, as producer of the yarn, and the smaller converters and processors whom American might not otherwise reach or be able to service economically (P.A. 39a-40a).

Malina and Shawmut, however, actually function at two levels of distribution as both processors and as jobbers. To assure that the jobber's discount would be given only on jobber resales, American devised a system of granting discounts only after the yarn had been resold to insure that dual function customers would gain a discount only on yarn so resold (D.A. 21a; P.A. 42a, 44a). (Gutner served solely as a jobber, doing no processing or converting of its own. However, to insure price uniformity—and to ascertain the legitimacy of the resales—the arrangement was identical.) These arrangements were formalized in written agreements (D.A. 21a).

Petitioner was a processor or converter which occasionally purchased from American and, in 1956, expressed a desire to serve also as an Avisco jobber (D.A. 21a-22a).*

* Although petitioner now claims that Empire had jobbed Avisco yarn (pp. 5-6), the record is far from clear that it had done anything other than purchase and convert American's yarn (D.A. 19a) and, then, in only two years (D.A. 13a).

However, American limited the number of jobbers with which it dealt and, therefore, declined to deal with Empire in that capacity (D.A. 29a). Hence, Empire could not lawfully be granted the five percent discount applicable only to yarn resold to others.

Empire thereupon on December 10, 1956—almost ten years ago—brought suit against American and the jobbers who did receive the discount, alleging violations of Sections 2(a), 2(c), 2(d) and 2(e) of the amended Clayton Act. *The Section 2(a) allegation was later consciously abandoned.* See, *e.g.*, 238 F. Supp. at 558.

The District Court ruled that American's jobbers rendered services within the meaning of Section 2(c) of the Act and that therefore the five percent discount would not constitute false brokerage. The (d) and (e) claims were dismissed out of hand.

A panel of the Court of Appeals by a two-to-one vote reversed the District Court on a holding that, although no brokerage relationship existed between American and the jobbers, the discounts nonetheless violated Section 2(c). Judge Moore in a dissent which was eventually adopted as the unanimous opinion of the Second Circuit upon rehearing *in banc* held that the discounts involved were functional discounts and not brokerage devices or otherwise within Section 2(c). Thus, such price differentials were to be tested, not under the brokerage section of the Act, but solely under Section 2(a) and subject to the defenses thereto, including those of 2(b).

The Federal Trade Commission submitted a brief *amicus curiae* to the Court of Appeals *in banc* which likewise contended that the discounts were functional discounts, not brokerage, and were therefore properly cognizable under Section 2(a) rather than 2(c). As noted, this rationale was ultimately accepted by a unanimous bench,

including both judges of the panel majority who wholly abandoned their prior—and novel—view and voted to affirm the District Court on the rationale of Judge Moore's dissent.

Summary of Argument

1. The ultimate—and unanimous—decision of the Second Circuit *in banc* is in full accord with this Court's views of Section 2(c) as expressed in *Broch* and, earlier, in *Simplicity Pattern*. No ascertainable congressional purpose or policy would be served either by subjecting functional discounts to *per se* condemnation under Section 2(c) or by extending that provision to cover transactions which do not and never did involve some aspect of brokerage or of allowances in lieu thereof.

2. That decision is also comfortably in line with prior decisions in other circuits and does not conflict with any previously adjudicated case either in the courts or before the Federal Trade Commission. There is, therefore, no novel or significant question of federal law or policy presented for resolution by this Court.

3. Just as no aspect of an abuse of brokerage or comparable allowances is presented here, so also the record presents no element of promotional or advertising allowances or services within the conventional ambit of Sections 2(d) and 2(e). No authority and no tenable policy consideration would warrant the application of either or both provisions to the circumstances of this case.

4. The Court below, in securing the views of the Federal Trade Commission as *amicus curiae*, acted well within its discretion in performing its judicial function of reviewing the initial determination of a divided panel.

ARGUMENT

I.

The decision below does not conflict in any way with applicable decisions of this Court.

Although violation of three parts of §2 was alleged, the case has centered on the question of whether, under these facts, §2(c) of the amended Clayton Act was violated. This section makes it unlawful to pay a commission, brokerage or other compensation or any allowance or discount in lieu thereof except for services rendered in connection with the sale or purchase of goods. In the decision sought to be reviewed, the Second Circuit has now unanimously held that §2(c) is not applicable in the absence of any showing that the discount granted here to jobber customers constituted brokerage or payments in lieu thereof.

Nevertheless, petitioner contends that "[w]hether the 5% is brokerage or in lieu of brokerage is irrelevant" (Pet., p. 12) and that, somehow, the decision of the Second Circuit that these facts are indeed relevant does violence to applicable doctrine of this Court as represented, primarily, by *FTC* v. *Henry Broch & Co.*, 363 U. S. 166 (1960) and *FTC* v. *Simplicity Pattern Co., Inc.*, 360 U. S. 55 (1959). We submit that, on the contrary, the Second Circuit followed exactly the guidelines set out in those decisions. In both, the Court commented on the reasons for the passage of 2(c) and, in both, made clear that the provision involves brokerage and abuse of brokerage.

In *Broch*, this Court held that 2(c) was violated when a seller's broker reduced his commission so that the seller

could make a sale to a buyer at a lower price. In the course of the opinion, it explained that §2(c) was enacted to cover the "means by which *brokerage* could be used to effect price discrimination" and was necessary "because §2(a) was not considered adequate to deal with *abuses of the brokerage function*" (pp. 169, 171; emphasis supplied).

As Justice Douglas explained (pp. 168-169):

> "The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price concessions and were thus avoiding the impact of the Clayton Act. One of the favorite means of obtaining an indirect price concession was by setting up 'dummy' brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay 'brokerage' to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of §2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased §2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination."

Previously but similarly, in *Simplicity* the Court, in holding that neither the presence of cost justification nor the absence of competitive injury constitutes a defense to a §2(e) charge, had outlined certain defined evils not covered by §2(a) which necessitated passage of §§2(c), (d) and (e):

> "Comparable competitive advantages were obtained by the large purchasers in several ways other

than direct price concessions. Rebates were induced for 'brokerage fees', even though no brokerage services had been performed. 'Advertising allowances' were paid by the sellers to the large buyers in return for certain promotional services undertaken by the latter. Some sellers furnished special services or facilities to the chain buyers." (p. 69)

Section 2(c) was patently designed to remedy this first evil as was 2(d) for the second and 2(e) for the third. Of course, "direct price concessions" injurious to competition (and not otherwise excused) were—and are—condemned by 2(a).

Section 2(c), in short, was designed to counter any opportunity for the exaction of discriminatory price advantages through the guise of false, sham or dummy brokerage. It is with this background and under these standards that the Second Circuit had to and, ultimately, did judge this case.

Obviously, if a statute is enacted to cover brokerage and its abuses, it is brokerage transactions that are to be tested.* Even so, whether "a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case," *Broch, supra,* at p. 176. As framed by petitioner, therefore, all this case required was a determination of fact—was brokerage in any way involved with the discounts granted to Malina, Shawmut and Gutner?

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* There is no claim or record of commercial bribery or other economic coercion by Malina, Gutner and Shawmut. Thus, the cases cited by petitioner (Pet. p. 13) to the effect that some evils other than false brokerage may be tested under Section 2(c) are wholly inapplicable. Cf. *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.*, 351 F. 2d 851 (9th Cir. 1965) cert. den. 383 U. S. 936 (1966); see Bodner and Burrus, *Developments in Antitrust,* 31 ABA Antitrust 101 (1966).

The answer is apparent and beyond contradiction.

American's discounts to its jobbers were ordinary functional discounts and not in any sense brokerage or payments or allowances in lieu of brokerage. Indeed, American had never sold through brokers. Malina (and Shawmut), to some extent, and Gutner, at all times, were legitimate distributors, functioning—and being compensated—as such; they were not in the brokerage business and did not render traditional brokerage services. Nor is there any suggestion in the record of any traditional brokerage role in this industry. Even the majority opinion of the three-judge panel in the Second Circuit which originally held for petitioner found that "[t]he set-up of this industry is quite different from a genuine brokerage" and that "the discounts granted to Malina and Gutner Brothers are not true brokerage because there is no brokerage relationship" (354 F. 2d at 186-7). The Federal Trade Commission, as *amicus curiae*, likewise found no factual basis for assuming that Malina and Gutner were acting either as dummy brokers or buying brokers:

> "In sum, there was no brokerage relation as such between American and Malina and Gutner and there was no *aura* of brokerage surrounding their business dealings derived from industry brokerage practices, past transactions between them, or other business conduct of any of them." (Appendix p. 7A)*

All nine members of the Second Circuit sitting in rehearing *in banc* agreed.

There is, therefore—absent some such "aura of brokerage"— no important or new question concerning the inter-

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*A complete copy of the FTC brief as filed below is included as an Appendix hereto.

pretation or administration of §2(c) in this case. In light of the history and meaning of the statute and the guidelines already set out by this Court, §2(c) simply could not apply to the situation at hand. The factual circumstances of this case show clearly that no aspect of brokerage was ever involved. To reiterate: two district judges, the original three-judge panel of the Second Circuit, all nine members of the Second Circuit upon rehearing *in banc*, and four members of the Federal Trade Commission have already so judged the facts. Yet, this Court is nevertheless now asked to *assess these facts again* to determine whether there was brokerage or something in lieu thereof. So viewed in its proper perspective, this case is certainly not appropriate for review by certiorari.

II.

No novel or important question of federal law is involved which has not been or should be settled by this Court.

Petitioner further argues that the opinion below raises an important question of federal law which should be settled by this Court. Here also petitioner clearly overstates the matter.

The attempt to make this case appear unique by arguing that this is the first case in which a "purpose and effect" test was applied to determine whether an alleged 2(c) violation should in fact have been brought under §2(a) is nothing more than a matter of labelling. To say that a transaction is to be tested by its "purpose and effect" is simply to say that a price concession must somehow be related to *brokerage* if §2(c) is to apply. That this standard—as already formulated by this Court in

Broch—has now been consistently applied and therefore presents no new question of interpretation or administration can be illustrated by the very cases petitioner cites.

For example, the First Circuit in *Robinson* v. *Stanley Home Products*, 272 F. 2d 601 (1959), found no 2(c) violation where, although the seller had terminated brokerage services and also decreased prices, no relationship between the decrease and the former brokerage payments was established. If a price decrease can be related to brokerage, §2(c) applies; otherwise §2(a) is applicable, as always. However, in the words of the Court, there is "no necessity for calling something brokerage that is not" (p. 604). After all, as that court remarked foreshadowing Judge Moore: "The question must be, what was the purpose of, or reason for, the reduction?" (p. 603).

The Seventh Circuit in *Central Retail-Owned Grocers, Inc.* v. *FTC*, 319 F. 2d 410 (1963) set aside an order of the FTC which found a violation of §2(c) because the Commission had not shown that the price concessions involved in that case were received in lieu of brokerage. Central had been set up as a purchasing group for retailer-owned wholesaler grocers. As such, it received discounts and allowances in connection with its purchases. Central made these purchases on its own order and on its own credit, was billed by the suppliers and paid the bills itself. Hence, since a "broker does not purchase for his own account, is not billed by the seller, and does not make payment to the seller" (p. 414), Central, the Court held, got favorable prices not because of brokerage or a saving in brokerage but because of advantages to suppliers inherent in the way it did business, i.e., volume purchasing, shift of credit risks and reduction in billing. Since the price concessions were not rooted in brokerage but given because of the special functions Central served, there was no violation of §2(c).

The Ninth Circuit saw the other side of the coin (in a case not cited by petitioner) and held that a discount, which "serves the same purpose, has the same effect and enjoys no economic justification which entitles it to be distinguished" from an allowance granted in lieu of brokerage, comes within a cease and desist order based on §2(c) "*—but not otherwise.*" *In re Whitney & Company*, 273 F. 2d 211, 215 (1959); emphasis supplied.

The Federal Trade Commission, too, has held that, if a discount was not designed to pass on or cover up a savings in brokerage but was truly a functional discount paid to an intermediate distributor as compensation for legitimate and useful economic functions, there is no violation of §2(c). *Edward Joseph Hruby*, 61 F.T.C. 1437 (1962).* In that case Hruby purchased foodstuffs on his own account from packers and other suppliers and resold to food wholesalers. His suppliers sold to him at a price under that charged on their direct sales to wholesalers. The Commission held that these discounts "have no resemblance whatever to the practices at which Section 2(c) was aimed" (pp. 1447-1448):

> "Hruby is clearly not a 'dummy' broker controlled by a large buyer to whom he passes on phony brokerage payments. Equally clearly, he is not himself a powerful wholesaler or retail chain exacting from his suppliers false brokerage payments, to the competitive disadvantage of his smaller competitors. And, finally, it is clear that the discounts received by Hruby are not granted because on sales to him sellers could dispense with brokerage services regularly required on their sales, thus effecting savings of usual brokerage fees."

* Commissioner MacIntyre dissented in *Hruby* and, adhering to the views there expressed, noted his abstention from the Commission position taken, *amicus*, in this case. See Appendix note 1.

The Commission accordingly found that the lower price "reflects not a saving of brokerage by the seller (for there is none) but, rather, the difference in the functional-competitive level at which Hruby and his wholesaler customers operate." (p. 1449) Therefore, the lower price charged Hruby was not unlawful under §2(c).

To cite yet another example, in *Main Fish Co.*, 53 F.T.C. 88 (1956), the Commission held that the price concessions involved, although coincidental with elimination of brokerage, were not within §2(c) since the evidence showed no connection between the concession and brokerage.

Finally, an apt summary of the law appears in the FTC brief *amicus:*

> "Application of §2(c) to price differences, discounts or allowances has been done only where the circumstances surrounding the lower price, discount or allowance granted to the buyer, such as, for example, the prior dealings of the parties, the brokerage practices followed in the industry, or the selling methods of the supplier, all pointed to the conclusion that the discount or concession in reality constituted the passing on to the buyer of a saving in brokerage or sales commission or a payment in lieu thereof." (Appendix, p. 9A).

The law, in short, is well settled. That Judge Moore happened to refer to "purpose and effect" when assessing the facts of this case involves no new interpretation or permutation and does not present any issue requiring or appropriate for resolution by this Court. It is clear that none of the factual characteristics of a §2(c) violation are here present. Nothing here presented warrants any conclusion but that a functional discount, defensible under §2(a), is all that is involved. That petitioner's primary objective throughout was a discriminatory price

is, however, evident both in its studied abandonment of any §2(a) charge and in the record (D.A. pp. 26a-28a). Indeed, this case is in all respects typical of functional discounting although petitioner, in yet another attempt to becloud the issue, characterizes the discounts here as "post-sale rewards" or "post-sale payments." All buyers from American, in other words, paid the same price. Some, the jobbers, were credited or paid a 5% discount when it had thereafter been determined that, rather than convert or process the yarn, they had in fact jobbed all or some of it. The consequence of this, petitioner asserts, is that there were no *price* concessions granted by American, thus making §2(a) inapplicable and preventing the discounts from being functional.

On both counts, petitioner's claim has no merit. First, arrangements similar to that in question have been tested under §2(a). See, e.g., *P. Sorensen Mfg. Co. Inc.*, 52 F.T.C. 1659 (1955) aff'd 246 F. 2d 687 (D.C. Cir. 1957); *Sherwin-Williams Co., et al.*, 36 F.T.C. 25 (1943). Secondly, the timing of the discount or payment certainly can not change the substance of the transactions involved. Judge Moore held that the "mere fact that the discount was granted 'after the fact' does not render unreasonable the conclusion that they were granted to provide an incentive and compensation for the performance of a vital economic function." 354 F. 2d at 191. The panel majority put no weight whatever on this point. The Federal Trade Commission did not reach this aspect of the case since it concluded the discount was truly conditioned upon the performance of legitimate distributive functions.

In economic effect, it is obvious that jobbers are entitled to, and to survive must receive, a lower price than proces-

sors (consumers). Indeed, Gutner who functions exclusively as a distributor is entirely dependent on functional pricing. This difference in price is a functional discount whether the difference is evident initially or determined at some later time. Since the different uses made of Avisco yarn by the processor/jobbers in this case could be accurately determined with respect to particular yarn lots only after a resale was made, it was only logical to compute the *functional discount* at that point.

The crucial question, in short, remains, not when was payment made or earned, but whether it bore some relation in some manner to brokerage.

III.

Sections 2(d) and (e) are equally unavailing.

Petitioner's renewed claim that §§2(d) and (e) were also—or, perhaps, alternatively—violated is not only inconsistent but so completely untenable as to be specious. This makeweight contention was so treated both by Judge Murphy, 238 F. Supp. at pp. 560-561, and by the Second Circuit, 364 F. 2d at p. 493.* Since, under the facts of this case, American furnished no promotional or advertising services or facilities to its jobbers and paid no money as compensation for such services or facilities furnished by the jobber defendants, neither 2(d) nor 2(e) could be involved. In its petition (pp. 14-15), Empire adds no facts or arguments that could make (d) and (e) applicable. At most, a factual issue is seemingly raised but, with no basis in the record to support petitioner's

* The Second Circuit in its first opinion and the FTC in its brief *amicus* did not even consider the 2(d) and (e) claims.

allegations, there is no more statutory warrant to invoke these provisions than there would be to invoke the Sherman Act without proving a restraint of trade.

IV.

The Court of Appeals did not depart so far from the accepted and usual course of judicial proceedings as to invoke this Court's supervisory powers.

Petitioner alleges that the Second Circuit, having granted a petition for rehearing *in banc* of its 2-to-1 panel decision, overstepped its authority in its *sua sponte* invitation to the FTC to submit a brief *amicus curiae*. In petitioner's view, the subsequent reference to this brief in its unanimous opinion endorsing the views of that agency as expressed in that brief constituted "a delegation of judicial authority to the Federal Trade Commission and calls for an exercise of this Court's power of supervision." (Pet. p. 17)

Judge Moore, writing for the unanimous court held that, "[a]fter due consideration of the briefs filed originally, of the briefs filed in the *in banc* rehearing and of the position taken by the Commission in its *amicus* brief, we unanimously affirm the order granting summary judgment for the defendants" (364 F. 2d at p. 492). The Court thereby adopted expressly the statutory interpretation set out in Judge Moore's dissent from the earlier panel opinion. Even those of the panel majority (Judges Hays and Smith) concurred.

Nothing in that opinion or otherwise indicates that the court below did not decide this case by and for itself. Judge Moore certainly delegated no authority to the Com-

mission in writing his original dissent. That he and the other eight judges acted improperly when sitting *in banc* cannot be assumed. Furthermore, petitioner raised no objection below when the brief *amicus* was requested and filed; indeed and in fact, petitioner's counsel took the opportunity extended by the Court to submit a further brief in answer to the Commission's points but, in his brief, raised no question as to the propriety of the procedure followed.

Thus, petitioner has in no way shown that the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision" under Rule 19(b) of the Supreme Court's Rules. In any event, the crucial question, we submit, is whether the Court below has now promulgated the proper ruling in terms of this case. We further submit that it has and that, therefore, the source of its views are irrelevant.

Conclusion

This case was unique only after the first decision in the Second Circuit. At that juncture, the ruling of the panel majority could fairly be characterized as novel, and even appear to prominent commentators as "startling"*, incongruous**, or as a "set back."***. Surely, that abortive ruling was contrary to the guidelines of this Court, the holdings of at least three other courts of appeal and of the Federal Trade Commission and clearly jeopardized

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* Rowe, 30 ABA Antitrust 15 (1966).

** Austern, *id.* p. 20.

*** Bodner and Burrus, 31 ABA Antitrust 100 (1966).

the accepted business practice of functional discounting, quite apart from foisting an unwanted distributor on American.

The unanimous decision of the Second Circuit Court of Appeals *in banc,* however, returned this case to the main-stream of current case law and prevailing Robinson-Patman theory and policy. That disposition, we submit, is entirely consistent with the understanding, practice and teaching of the Federal Trade Commission, the agency charged with administration of the Act, and with current business practices and economic needs.

Certiorari should be denied.

Respectfully submitted,

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December 2, 1966.

In the United States Court of Appeals for the Second Circuit

No. 29554

EMPIRE RAYON YARN CO. INC., PLAINTIFF-APPELLANT

v.

AMERICAN VISCOSE CORPORATION, FRED MALINA, ARTHUR MALINA, EDYTHE M. CHARNAS AND FRED H. DIAMOND, CO-PARTNERS DOING BUSINESS AS MALINA COMPANY, GUTNER BROTHERS CORPORATION, DEFENDANTS-APPELLEES

BRIEF OF THE FEDERAL TRADE COMMISSION AS *AMICUS CURIAE*

The Federal Trade Commission herewith submits this brief (the position taken herein is without the concurrence of Commissioner MacIntyre)[1] in response to an invitation received April 28, 1966, from the

[1] Commissioner MacIntyre does not concur in the position taken in the Commission's brief since in his view that position is based upon the rationale of *Edward Joseph Hruby*, 61 F.T.C. 1437 (1962). The reasons for his dissent from that position are set forth in full in his dissenting opinion in *Edward Joseph Hruby*, *supra*, at p. 1449.

Commissioner Elman believes that the scope and interrelation of subsections (a) and (c) of Section 2 of the Clayton Act are correctly described in Judge Moore's dissenting opinion.

Court "to submit a brief *amicus curiae* on the issues raised by this case."

STATEMENT OF FACTS

Plaintiff-Appellant, Empire Rayon Yarn Co., Inc., brought suit for treble damages against the American Viscose Corporation, Fred Malina, Arthur Malina, Edythe M. Charnas and Fred H. Diamond, doing business as Malina Company (hereinafter referred to collectively as Malina), Gutner Brothers Corporation, and Shawmut, Inc., alleging violations of Section 2 (a), 2(c), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. The allegation of price discrimination in violation of Section 2(a) was later abandoned.

The following are understood to be the essential facts underlying the subject action. American Viscose Corporation is a major producer of rayon yarn, the bulk of which it sells directly to manufacturers who convert or process it into fabric or other products for various uses. The balance of American's yarn, consisting of a small percentage of its production, is sold to three jobbers, Malina, Gutner, and Shawmut, who are able to sell to and service smaller manufacturing units of the textile trade more economically than American. For that reason, the jobber relation was established, and contracts governing it executed between the parties. The contracts which American signed with these jobbers were virtually identical and recited that American wished to avail itself of selected jobbers in selling rayon yarn to bona fide fabric manufacturers who, either because of their inability to pro-

duce in bulk or because of their inadequate credit position, were not supplied directly by American. The jobber function of Malina, Gutner, and Shawmut was defined "to consist of the resale of said yarn in original form to bona fide manufacturers, together with the maintenance at the Jobber's expense of adequate stocks, a warehouse and a sales force."

As jobbers, and pursuant to the contract, Malina, Gutner, and Shawmut performed such economic functions as the maintenance of substantial inventories of yarn, maintenance of an experienced selling organization, assumption of all risk of loss and credit, advertising of American products, assumption of all risk of price fluctuation, and furnishing of technical assistance to users of rayon yarn. Upon submission to American of proof that the yarn had been resold in its original condition and in its original package at American's published list price, Malina, Gutner, and Shawmut received a 5% discount from the list price of American as of the date of original shipment to them. Small processors and converters who bought from the foregoing jobbers paid the same list price for yarn as larger concerns who bought direct at list price from American. Gutner acted as a jobber only, and only for American's yarn. Gutner had no other business activity. Malina and Shawmut acted as jobbers and also as processors, but procedures were set up by American to prevent any possible price discrimination between them in the latter capacity and competing processors. On yarn bought from American and used for processing Malina and Shawmut paid the same price to American as all other processors.

Empire purchased rayon yarn from American for manufacturing purposes, and paid list price therefor. Empire, however, also wanted to act as a jobber for American like Malina, Gutner, and Shawmut, and to buy yarn for resale to manufacturers, processors, and converters with a 5% discount from American's list price upon proof of resale at such list price. American refused to sell to Empire as a jobber on such terms giving as a reason that in the exercise of its own business judgment the volume of yarn sold to the jobbing trade did not justify designating any additional jobbers. Empire thereafter commenced this action for treble damages and injunctive relief.

The district court found, 238 F. Supp. 556 (S.D. N.Y. 1965), that Malina and Gutner[2] "rendered services" within the meaning of Section 2(c), and that the 5% discount did not constitute false brokerage in violation of that section. This Court, 354 F. 2d 182 (2d Cir. 1965), with Judge Moore dissenting, reversed the district court's determination concluding that, although no brokerage relation had existed between American and its jobbers, the discounts nevertheless fell within the language and legislative intent of Section 2(c).

ISSUE

Whether the payment by American of the 5% discount from list price to Malina and Gutner, upon

[2] Empire dismissed its action against Shawmut, Inc., in 1963 without prejudice to its action against the other defendants. For this reason the discussion hereafter will be limited to Malina and Gutner.

proof that they had resold the yarn in its original condition at American's list price, was an illegal brokerage payment in violation of Section 2(c).

DISCUSSION

Under the foregoing facts the 5% discount granted by American to Malina and Gutner was not, in our view, an unlawful "brokerage" payment, or allowance or discount in lieu thereof, violative of Section 2(c). Whether there was an unlawful price discrimination inherent in American's allowance of such a discount to Malina and Gutner on rayon yarn resold by them as jobbers was, in our opinion, a question properly to be determined under Section 2(a), which outlaws price discrimination where there is resulting competitive injury.

We believe that a consideration of all the facts surrounding the discount granted Malina and Gutner precludes a finding that it constituted a violation of Section 2(c). The crucial question in every case brought under Section 2(c) is whether the buyer is receiving preferential treatment effected through the payment of "brokerage, or other compensation, or any allowance or discount in lieu thereof." The answer requires the resolution of a question of fact and must be determined on the basis of all the circumstances prevailing in each case. *Federal Trade Commission* v. *Broch*, 363 U.S. 166, 175–176 (1960); In re *Whitney & Co.*, 273 F. 2d 211, 214 (9th Cir. 1959); *Main Fish Co.*, 53 F.T.C. 88 (1956); *Edward Joseph Hruby*, 61 F.T.C. 1437 (1962).

There is no factual basis for assuming in this case that Malina and Gutner were acting as "dummy" brokers to permit the cloaking of a rebate to the buyer, which was one of the chief targets of Section 2(c) when enacted. *S. Rep.* No. 1502, 74th Cong., 2nd Sess., p. 7; *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 69 (1959). Nor, obviously, were Malina and Gutner powerful buyers able to compel through economic power the payment of the discounts by American in lieu of brokerage. *Great Atlantic and Pacific Tea Company* v. *Federal Trade Commission*, 106 F. 2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); *Interborough News Co.* v. *Curtis Publishing Co.*, 10 F.R.D. 330 (D.C. N.Y. 1950). The 5% discount to Malina and Gutner was not allowed in the context of a saving to American of a brokerage fee customarily paid by American to a broker whose services were dispensed with. *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission, supra; Kadiak Fisheries Company*, 57 F.T.C. 107 (1960). Indeed, the record shows American did not utilize any brokers in selling its rayon yarn, but instead marketed its yarn itself direct to fabric manufacturers, converters and processors. The facts do not reveal that either Malina or Gutner ordinarily functioned as a broker and, therefore, there is no suggestion that they fell into the "buying broker" category: *Southgate Brokerage Co.* v. *Federal Trade Commission*, 150 F. 2d 607 (4th Cir. 1945); *Columbia River Packers Ass'n*, 44 F.T.C. 118 (1947). There is, further, no showing in the record that the employment of brokers

by American or its competitors was an industry practice in the sale of the yarn to processors or converters for the manufacture of fabric or other finished products. If such had been the case, and if the discount to Malina and Gutner had been the equivalent of brokerage currently paid by manufacturers of rayon yarn to brokers for sales to processors and converters, it would have been persuasive evidence, although not necessarily conclusive, indicating that the 5% discount was a disguised brokerage payment. See *Federal Trade Commission* v. *Broch, supra,* 363 U.S. 166, note 10, and Commission cases there cited.

In sum, there was no brokerage relation as such between American and Malina and Gutner and there was no *aura* of brokerage surrounding their business dealings derived from industry brokerage practices, past transactions between them, or other business conduct of any of them.

Under these circumstances more positive indications than exist in this case would have to be present, in our opinion, before the 5% discount granted Malina and Gutner could properly be characterized as compensation, or an allowance or discount in lieu of brokerage, within the scope of Section 2(c). Malina and Gutner took title and resold to small manufacturers. They solicited and obtained their own customers, and assumed all risks of loss and credit. They operated warehouses, and maintained substantial inventories of yarn. They employed and maintained substantial selling organizations, advertised American's yarn, and furnished technical assistance to their customers. They appear to have been, in short, under

the facts shown by the record, independent business men who operated as jobbers at a level of distribution between the manufacturer of the yarn and the processor who found it economically difficult to buy direct. They plainly satisfied an economic need by facilitating the movement of American's rayon yarn to the small units in the textile trade. Under these circumstances, the 5% granted to Malina and Gutner bears all the characteristics of a functional discount, the validity of which should be judged under Section 2(a).

One of the chief targets of Section 2(c) was the abuse of the brokerage function.[8] *Federal Trade Commission* v. *Broch, supra,* 363 U.S. at 169. The report of the House Judiciary Committee, H.R. Rep. No. 2287, 74th Cong., 2nd Sess., p. 14, described Section 2(c) as dealing:

> * * * with the abuse of the brokerage function for purposes of oppressive discrimination.

The granting or accepting of "anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof," was made by Congress a *per se* violation without the statutory defenses applicable to price discriminations proscribed by Section 2(a). *Federal Trade Commission* v. *Simpilicity Pattern Co., Inc.,* 360 U.S. 55, 69 (1959); *Oliver Brothers, Inc.* v. *Federal Trade Commission,* 102 F. 2d 763, 766–768 (4th Cir. 1939).

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[8] Another aspect which concerned Congress in enacting Section 2(c) was the preservation of the integrity of the brokerage relation. H.R. Rep. No. 2287, 74th Cong., 2nd Sess., p. 15 (1936). See *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.,* 351 F. 2d 851, 856 (9th Cir. 1965).

As indicated earlier, Section 2(c) has in fact been applied in many cases to price differences, discounts and allowances. As the Supreme Court stated in *Broch, supra* (363 U.S. 166, note 14):

> If Congress envisaged the evil as the transmission of brokerage commissions to the buyer, then to permit the buyer to get the same thing under 2(a) in another form and name would deprive 2(c) of all substance.

But application of Section 2(c) to price differences, discounts or allowances has been done only where the circumstances surrounding the lower price, discount or allowance granted to the buyer, such as, for example, the prior dealings of the parties, the brokerage practices followed in the industry, or the selling methods of the supplier, all pointed to the conclusion that the discount or concession in reality constituted the passing on to the buyer of a saving in a brokerage or sales commission, or a payment in lieu thereof. See, *e.g., Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission, supra.* As noted, none of the foregoing circumstances appear to be present in this situation.

Furthermore, Section 2(c) applies to a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, paid by the seller or the buyer for services rendered in connection with the original sale or purchase. It does not apply in its terms to the resale by the buyer to a third party. The 5% granted by American to Malina and Gutner was not compensation paid to them for services rendered to American in connection with the sale by it of its goods, but rather was a reduction of the price to them

granted when they resold the yarn to small third party buyers for converting or processing. Yet the decision in this case holds Section 2(c) applicable because the discount was "related" to a resale by Malina and Gutner to *their* customers. Such a holding seems to constitute an unwarranted extension of Section 2(c) beyond its statutory limits.

Finally, by testing the legality of American's 5% discount to Malina and Gutner under Section 2(c), the majority in this case has enunciated a precedent which appears to be equally applicable to all functional discounts, and could render all functional discounts illegal *per se*. Under this interpretation businesses operating at one level in distribution could not lawfully receive lower prices because of a discount, or discount system, than businesses at another distribution level, even though the two levels did not compete, and the price differences resulting from the differing discounts were otherwise without significant anti-competitive effects. Thus, suppliers would be unable to recognize by means of varying discounts the performance of legitimate and distinctive economic functions in the chain of distribution. Such functional prices, as far as we know, have never heretofore been considered to fall within the ambit of Section 2(c) as payments or discounts granted by the seller to the buyer which were absolutely prohibited.

Where so-called functional discounts have had anti-competitive effects they have been challenged by the Commission, as in the case of other price discriminations, as violative of Section 2(a). See, *e.g., Fed-*

eral Trade Commission v. *Ruberoid*, 343 U.S. 470 (1952); *Purolator Products, Inc.* v. *Federal Trade Commission*, 352 F. 2d 874 (7th Cir. 1965); *Mueller Co.* v. *Federal Trade Commission*, 323 F. 2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); *E. Edelmann & Company* v. *Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958), *rehear. denied*, 356 U.S. 905; *Thomas Y. Crowell Company*, 52 F.T.C. 919 (1955); *P Sorensen Manufacturing Co., Inc.*, 52 F.T.C. 1659 (1955); *aff'd*, 246 F. 2d 687 (D.C. Cir. 1957); *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953); *General Motors Corp.*, 50 F.T.C. 54 (1953); *Electric Auto-Lite Co.*, 50 F.T.C 73 (1953).

CONCLUSION

In accordance with the foregoing, it is our view, based upon the facts as we understand them, and as set out in this brief, that the discounts involved in this case were properly cognizable under Section 2(a) rather than under Section 2(c) of the Robinson-Patman Act.

Respectfully submitted.

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